Selection of Leading Cases

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LIMITATION

Supplementary Cases

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SELECTION OF LEADING CASES.

LIMITATION ACT.

Present:—Lord Macnaghten, Sir Andrew Scoble, Sir Arthur Wilson and Sir Alfred Wills.

MANIRAM SETH

v.

SETH RUPCHAND.

[*Reported in I.L.R. 33 Calc. 1047 P. C; L. R. 33 I. A. 165; 14 C. L. J. 94 P. C; 10 C.W.N. 874 P.C.*]

P. C.
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May 11, 25

The plaintiff was the appellant to His Majesty in Council.

The main question on this appeal was whether the suit was barred by limitation.

The plaintiff, a minor, was the adopted son of one Motiram Seth, a banker in the village of Burhanpur, who died on 6th October 1898, leaving a will executed on the same day, of which he appointed five persons, of whom one was Rupchand the defendant, his executors and trustees and leaving a considerable part of this estate to the plaintiff.

During Motiram's life-time there had been a regular course of dealing between him and Rupchand, the account books showing transactions extending from 21st July 1895 to 12th May 1898; and on 13th November, 1898, when the accounts were made up, the books showed sums of Rs. 5,841-9-1 for principal, and Rs. 2,801-2 for interest at 10 annas per cent. per month were due by Rupchand to Motiram's estate.

On 23rd June 1899 Rupchand, Girdharilal and Jiwandas, three of the executors or trustees named in the will applied for probate under section 62 of Act V of 1881 (The Probate and Administration Act, 1881), stating in their petition that, out of the five persons named, they alone were willing to become executors. This application was opposed by the other two persons named in the will and by Kisandas, the natural father

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of the plaintiff. A reply to the objections was put in by the applicants for probate, in which it was stated among other things as follows :—

"3. That the applicant Rupchand Nanabhai is a big mahajan of Burhanpur paying Rs. 106 as income-tax. For the last five years he had open and current accounts with the deceased. The alleged indebtedness does not affect his right to apply for probate."

Probate of the will was, on 28th September 1900, refused on the ground (as appears from the judgment of the Civil Judge in the present suit, for the orders of the Probate Court were not on the record) that the persons named in the will had not been legally appointed executors, and the order rejecting the application for probate was upheld on appeal by the Judicial Commissioner on 30th November 1900.

Letters of administration were not applied for, but in 1901 Kisandas applied for a certificate of guardianship to the plaintiff's estate under the Guardians and Wards Act (VIII of 1890) and this application was opposed by Motiram's widow, Rupabai; and on 12th March 1901, Rambordas, one of Motiram's agents, was by order of the District Judge appointed receiver of the estate pending the disposal of the application for a certificate of guardianship.

On 4th July 1901 the defendant was examined as a witness in the certificate proceedings, when he stated as follows :—

"I cannot say how much, if any, I owe to Motiram Mohanlal's firm. I had a bahi khata account with it. Whatever is found due by me I am ready to pay. I probably owe something, but I cannot say definitely. (Witness is shown Motiram's bahi khata.) I cannot say from this how much I owe. I shall compare it with my own khata and then I can say, it is a mahajani account. When we require money for our lending business we borrow money from another Sahukar. Accounts are settled every Dewali. I have also an account of my dealings with Motiram. Balances have not been struck for two or three years between us. I verified the petition for probate. I may have signed and verified a written answer to non-applicant's statement. What I wrote in the petition and answer, if I sign them, is correct."

On 5th September 1901 the present suit was instituted against Rupchand by Rambordas as next friend of the plaintiff, to recover the principal and interest calculated as above stated due from the defendant on Motiram's accounts. On 4th December 1901, Kisandas, who had obtained a certificate of

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guardianship after the filing of the plaint, was substituted for Rambordas on the record as next friend of the plaintiff.

The defendant put in a written statement, in which he admitted that money had been taken from Motiram amounting to Rs. 45,900, of which he had repaid Rs. 40,150, and that the balance was still outstanding. He alleged that no time had been fixed for repayment, and that the rate of interest was 7 annas 9 pie and not 10 annas; and he denied that there had been any settlement of accounts; and pleaded that the suit was barred by limitation.

The plaintiff filed a reply, in which he pleaded that the suit was not barred, because the defendant had acknowledged his liability in his petition of 28th September 1899 and in his deposition made on the 4th July 1901; and also by reason of the fact that the defendant had been acting as trustee under Motiram's will at any rate up to 30th November, 1900.

The judgment of their Lordships was delivered by

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Sir Alfred Wills. One Motiram, of whom the appellant (the plaintiff in the action) is the adopted son, and one Rupchand, the respondent and the defendant in the action, were mahajans or money-dealers, both residents of Burhanpur in the Central Provinces. They had regular dealings with one another from 21st July, 1895 to 12th May, 1898, and at the close of these dealings the respondent owed Motiram Rs. 5,841-9-1 on account of principal, and Rs. 2,801-2-0 on account of interest. No question has been raised as to the correctness of these amounts if the action be maintainable.

The present suit was brought on 5th September, 1901 to recover these amounts. There is no question that they were due. The respondent admitted in his pleading that they were so, and the only defence is that the action was barred by the lapse of time.

Motiram died on the 6th October, 1898 leaving a will by which the respondent and four other persons were appointed trustees to administer the estate. Three of them, of whom the respondent was one, applied for probate. The application was opposed by the other two and by Kisandas, the natural father of the appellant. Their petition of objections is not in the

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record, but the reply, signed by the respondent and others is set out, and from it there can be no doubt that amongst the objections was one on the ground that the respondent owed money to the estate. Paragraph 3 is as follows: "The applicant Rupchand Nanabhai is a big mahajan of Burhanpur paying Rs. 106 as income tax. For the last five years he had open and current accounts with the deceased. The alleged indebtedness does not affect his right to apply for probate." This document is dated 28th September, 1899.

The application for probate failed on the ground that the applicants were not legally appointed executors.

There was no application for letters of administration, but in 1901 Kisandas applied for a certificate of guardianship, an application which was opposed by the widow, and in the result Ranchordas, one of Motiram's head agents, was appointed interim receiver of the estate, until the question of a certificate of guardianship was disposed of.

Ranchordas, as next friend of the infant plaintiff, instituted the present suit, and on the 4th December, 1901 Kisandas, having obtained the certificate of guardianship, was substituted for him.

A question has been raised as to whether the dealings between the respondent and Motiram were mutual as well as open and current, and involved reciprocal demands between the parties so as to make article 85 of the Indian Limitation Act (No. XV of 1877), Schedule II, applicable. The dealings were certainly not the ordinary ones of banker and customer, but rather in the nature of mutual accommodation, but the view which their Lordships take makes it necessary to consider this question, and for the purposes of this case the controversy may be treated as if the sum due to Motiram was a simple debt or series of debts, none of which were incurred before 28th September, 1896, since as late as the 24th January, 1897 Motiram, as appears by the summary of accounts appended to the judgment of the Civil Judge (the Court of First Instance), had drawn against the respondent for more than the respondent had drawn against him.

The last item against the respondent in account between them is dated 12th May 1898, and the indebtedness for principal

must therefore have been incurred between 24th January 1897 and 12th May 1898, and the periods of limitation applicable to the several components of the total demand for principal would expire at various dates between 24th January 1900 and 12th May 1901. And in the absence of a sufficient acknowledgment before such periods had arrived, the debt or debts would be barred.

An acknowledgment according to the Indian Act must be signed by the party to be affected by it, and the only document, which can be relied upon as an acknowledgment signed by the respondent, is the statement filed by the respondent in the proceedings touching the application for probate, the material part of which has been already set out, but which it is convenient here to repeat. "For the last five years he" (the respondent) "had open and current accounts with the deceased." There can be no doubt that the five years spoken of are the five years before the death of Motiram, *i.e.*, before 6th October, 1898. On that date the whole of the indebtedness other than interest had been incurred, there having been no dealings since 12th May, 1898. There is therefore a clear admission that there were open and current accounts between the parties at the death of Motiram. The legal consequence would be that at that date either of them had a right as against the other to an account. It follows equally that, whoever on the account should be shown to be the debtor to the other, was bound to pay his debt to the other, and it appears to their Lordships that the inevitable deduction from this admission is that the respondent acknowledged his liability to pay his debt to Motiram or his representative, if the balance should be ascertained to be against him.

The question is whether this is sufficient by the Indian law to take the case out of the statute.

It has been already pointed out that the acknowledgment was made before the statutory period had run out. Thus one requisite of section 19 is complied with. The necessity of signature by the party to be charged is also complied with. The acknowledgment is not addressed to the person entitled, but according to the "explanation" given in section 19 this is not necessary. We have therefore the bare question of whether an acknowledgment of liability, if the balance on investigation

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should turn out to be against the person making the acknowledgment, is sufficient.

Their Lordships can see no reason for drawing any distinction in this respect between the English and the Indian law. The question is whether a given state of circumstances falls within the natural meaning of a word, which is not a word of art, but an ordinary word, of the English language, and this question is clear of any extraneous complications imposed by the statute law of either England or India.

In a case of very great weight, the authority of which has never been called in question, Lord Justice Mellish laid it down that an acknowledgment to take the case out of the Statute of Limitations, must be either one from which an absolute promise to pay can be inferred, or, secondly, an unconditional promise to pay the specific debt, or, thirdly, there must be a conditional promise to pay the debt, and evidence that the condition has been performed. [*In re Rivers Steam Company, Michell's claim*[1].] An unconditional acknowledgment has always been held to imply a promise to pay, because that is the natural inference, if nothing is said to the contrary. It is what every honest man would mean to do. There can be no reason for giving a different meaning to an acknowledgment that there is a right to have the accounts settled, and no qualification of the natural inference that, whoever is the creditor shall be paid, when the condition is performed by the ascertainment of a balance in favour of the claimant. It is a case of the third proposition of Lord Justice Mellish, a conditional promise to pay and the condition performed.

There was therefore on the 28th September, 1899 a sufficient acknowledgment to give a new period of limitation from the date of the acknowledgment, *viz.*, 28th September, 1899, and the present suit having been commenced on 5th September 1901 is within any period of limitation that can be applicable.

The acknowledgment, to which attention has been directed, is followed in the same paragraph by the following sentence: "The alleged indebtedness does not affect his" (the respondent's) "right to apply for probate." Stress was laid by the Civil

[1] (1871) L. R. 6 Ch. App. 822, 828.

Judge upon the word "alleged." He was of opinion that the word "had" in the sentence "for the last five years he had open and current accounts with the deceased" and the word "alleged" were fatal to the validity of the acknowledgment. Their Lordships cannot share this opinion. The first sentence shows that there were open accounts at the death of Motiram. If nothing further is alleged the natural presumption is that they continued unsettled at the time the statement was made. The sentence which follows is perfectly consistent with this admission. The meaning is "even if there is a balance against the respondent, that does not disqualify him from fulfilling the duties of an executor," and it has been pointed out that what is relied upon here is an acknowledgment subject to the condition that an adverse balance really exists, and the condition is fulfilled in fact.

The judgment in the Divisional Judge's Court is also against the acknowledgment. The only reason given is that it would require a considerable stretch of the imagination to place upon it the meaning that there was a right to have the account taken, thereby implying a promise to pay. It has not, however, been argued that there was a promise to pay in any event, and the learned Judge does not seem to have considered the meaning, which appears to their Lordships to be the natural one, that the words import an admission of liability, if the balance should prove to be against the respondent coupled with the fulfilment of that condition—a state of things which in all reason and sound sense places the acknowledgment upon the same footing as an acknowledgment unconditional in the first instance, from which, in English law, a promise to pay has always been inferred. The Indian Limitation Act, section 19, however, says nothing about a promise to pay and requires only a definite admission of liability, as to which there can be no reason for departing from the English principle that an unqualified admission and an admission qualified by a condition, which is fulfilled, stand upon precisely the same footing.

The view taken by the Judicial Commissioner is again one with which their Lordships are unable to agree.

He refers to a case of *Sitayya* v. *Rangareddi*[1] in which it was held than an acknowledgment of the plaintiff's right to have

[1] (1887) I. L. R. 10 Mad. 259.

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accounts taken and of the defendant's liability to pay any balance (if such there should be) against him was held to satisfy section 19 of the Limitation Act. But this decision appeared to him to be either erroneous or inapplicable, because it is based upon two English cases, *Prance* v. *Sympson*[1] and *Banner* v. *Berridge*[2], in which similar acknowledgments were held to satisfy the English law upon the subject, the acknowledgment in *Prance* v. *Sympson*[1] being undistinguishable from that relied upon in the present case. He goes on to give as his reason for considering that the English cases do not apply in the present case the fact that the English law requires words from which a promise to pay may be inferred, whereas the Indian Act requires words, from which an admission of liability may be inferred. But in English law it is the acknowledgment of liability, which is the ground upon which a promise to pay is inferred, so that the requirements of English law are, if anything, more, and not less, stringent than those of Indian law, which seems to be a bad reason for holding that the English cases have no application to the present inquiry. The learned Judicial Commissioner further agrees with the Civil Judge in holding that the expression "alleged indebtedness" is a stumbling block in the way of the appellant, a view upon which their Lordships have already expressed their opinion.

In the opinion of their Lordships therefore the acknowledgment of the 28th September 1899 is sufficient to prevent the claim of the appellant from being barred by the Limitation Act. It is therefore unnecessary to discuss the other grounds upon which the appellant has relied. Their Lordships would notice only one point in connection with them. The appellant contended that the respondent, whether appointed executor by the will or not, had intermeddled with the property of the deceased, and was at all events executor *de son tort*, and therefore not entitled to the benefit of the Limitation Act. The respondent has in this suit admitted in the most definite manner that he did so. In spite of this admission each of the three Courts below has held that he did not, and the respondent's Counsel claimed that this was a decision of a matter of fact, and that however erroneous it might be, it would be contrary to the practice of the Judicial

[1] (1854) 1 Kay 678.
[2] (1881) L. R. 18 Ch. D. 254: 50 L. J. Ch. D. 630.

Committee to entertain the question of its reversal. A careful perusal of the judgments, however, makes it perfectly clear that the only reason for the view taken by the Courts below was that they thought the respondent had not been duly appointed executor, and therefore could not have intermeddled with the estate so as to make himself responsible as executor. Their decision was therefore really one of law, and not of fact, and is open to reconsideration.

Their Lordships will humbly advise His Majesty that the judgments appealed against be reversed, and judgment entered for the appellant for the principal claimed, with interest at the rate of 7 annas 9 pie per cent. per mensem to date of suit and thereafter at the rate of 6 per cent. per annum till payment, and that the respondent be ordered to pay the costs of the appellant in each of the Courts below. The respondent will also pay the costs of this appeal.

Appeal allowed.

Note.—In order to attract the applicability of Section 19 of the Indian Limitation Act, the acknowledgment must be made before the statutory period had run out and should be in writing and signed by the party to be charged. It need not be addressed to the person entitled. The acknowledgment need not be express; it may be left to implications. It must be a necessary implication from the words used that the person acknowledging was referring to and admitting *the* liability, not *any* liability. *Golaprao* v. *Harilal*, 9 Bom. L. R. 715 (718). It is not necessary that all legal consequences that may flow from the obligation acknowledged, should be specified to constitute an acknowledgment. *Sukhamoni* v. *Ishan*, I. L. R. 25 Calc. 844 P. C.; L. R. 25 I. A. 95; *Kadiri* v. *Monki*, 19 M. L. J. 650; *Kallianni Amma* v. *Narayanan*, 28 M. L. 6. 266 (268).

The acknowledgment should be an acknowledgment of liability in respect of the right claimed and not that of a different right to that claimed. Thus, in a suit against a tenant from year to year, an acknowledgment that he was a permanent tenant is of no avail. *Venkataramana* v. *Srinivasa*, I. L. R. 6 Mad. 182; *Narayanappa* v. *Vasker*, 7 Bom. H. C. R. A. C. J. 125 (129).

There cannot be an acknowledgment without knowledge that the party is admitting something. *Dharma* v. *Govind*, I. L. R. 8 Bom. 99 (102).

If a person admits a right, it is a necessary implication that he also admits the legal consequences of that right. Thus, where a person admits that land, of which he is in possession at the time of the execution of the *Kabuliat*, he admits that he is liable to restore it to that other. *Guru* v. *Surendra*, 19 C. W. N. 263 (265).

An acknowledgment, to whomsoever made, if it be an acknowledgment pointing with reasonable certainty to the liability in dispute or the right out

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of which that liability arises as a legal consequence, is an acknowledgment of liability. *Guru* v. *Surenda*, 19. C. W. N. 263 (265).

An acknowledgment of a conditional liability will not give a fresh start as long as the condition remains unfulfilled. There must be an unqualified admission or an admission qualified by a condition which is fulfilled. *Arunachalla* v. *Rangiah*, I. L. R. 29 Mad. 519; 16 M. L. J. 563.

An acknowledgment to be effectual must have been a good acknowledgment at the date when it was made. An acknowledgment by one of several heirs or the mortgagee of the mortgagor's right of redemption would not be sufficient to give a new starting point for limitation even to the extent of the interest of the person acknowledging. *Vaikunta* v. *Kunni Pukki*, 19 M. L. J, 288. For a contrary view, see *Sheonandan* v. *Achhaibar*, 7 A. L. J. R. 847. But an acknowledgment of a judgment by one of several judgment-debtors keeps alive the decree against such judgment-debtor alone and not against the others. If a part only of the debt is acknowledged, to that extent it is kept alive. *Chandra* v. *Ramdin*, 15 C. L. J. 251; 16 C. W. N. 493; *Brojonath* v. *Gaya Sundari*, 6 C. L. J. 141.

Before Mr. Justice Mookerjee and Mr. Justice Caspersz.

TARA NATH CHAKRABARTI

v.

ISWAR CHANDRA DAS SARKAR.

[Reported in 14 C.L.J. 598].

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April, 20.
May, 3.

The judgment of the Court was delivered by

MOOKERJEE J.—This is an appeal on behalf of the defendants in an action in ejectment. The plaintiffs respondents commenced this action for recovery of 14 parcels of land, of which they claimed to be tenants under the defendants appellants as zemindars. The defendants conceded that the plaintiffs were their tenants, but denied their tenancy in respect of the lands in dispute. The Court of first instance dismissed the suit. Upon appeal, the Subordinate Judge decreed the suit in part, in respect of the plots to which the tenancy right of the plaintiffs had been established. The defendants have now appealed to this Court, and on their behalf the only substantial question of law which has been argued is that the claim is barred by limitation, inasmuch as the plaintiffs were occupancy raiyats, and, according to their own case, had been dispossessed more than two years before the commencement of the suit. The plaintiffs, on the other hand, have contended that they were tenure-holders, and no question of limitation arose as they had brought the suit within twelve years from the date of dispossession.

The learned Subordinate Judge in the Court below has found, that the defendants had failed to prove that the plaintiffs were occupancy raiyats, and that consequently the special rule of two years limitation could not be applied to the claim. The present appeal was heard by a Division Bench on the 26th April, 1909, and on that occasion an order was made under Order 41, Rule 25 of the Civil Procedure Code, 1908, to enable the lower Court to determine the true character of the tenancy. The Subordinate Judge has now returned the finding that the plaintiffs had failed to prove that they were tenure-holders as

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asserted by them. The position, therefore, in substance, is that the origin of the tenancy is unknown, and neither the plaintiffs nor the defendants have been able to establish their allegation as to the true character of the tenancy.

It is worthy of remark that the provision in clause (7) of section 20 of the Bengal Tenancy Act is of no assistance to the parties. That clause provides that if in any proceeding under the Act, it is proved or admitted that a person holds any land as a raiyat, it shall, as between him and the landlord under whom he holds the land be presumed, until the contrary is proved or admitted, that he has for twelve years continuously held that land or some part of it as a raiyat. In the first place, this suit for ejectment cannot be properly deemed a proceeding under the Bengal Tenancy Act; in the second place, it is neither proved nor admitted that the plaintiffs hold as raiyats, and consequently no presumption can arise that they are occupancy raiyats. Nor is the presumption laid down in clause (5) of section 5 of the Bengal Tenancy Act of any use in the solution of the question raised before us. That clause provides that where the area held by a tenant exceeds 100 standard bighas, the tenant shall be presumed to be a tenure-holder until the contrary is shewn. Here the area held by the tenant does not exceed 100 bighas. Consequently, the statutory presumption is entirely inapplicable. It may be observed here that the clause to which reference has been made does not embody a presumption that where the area held by a tenant is less than 100 bighas, the tenant is to be presumed to be a raiyat until the contrary is shewn. The presumption created by the Legislature is purely unilateral, and its scope and applicability cannot be extended beyond its legitimate limits.

The position, therefore, is that the plaintiffs have been proved to be the tenants of the disputed lands under the defendants as their landlords, who have unlawfully dispossessed them. No information is available as to the origin of the tenancy, and nothing is known about the purposes for which the tenancy was created. The question arises, under these circumstances, whether the general rule of limitation embodied in Article 142 of the second Schedule of the Limitation Act is to be applied or whether the special rule of limitation laid down in Article 3

of Schedule III of the Bengal Tenancy Act is to be taken to govern the matter. The learned counsel for the defendants appellants has contended that as clause (1) of section 184 of the Bengal Tenancy Act, quite as much as section 4 of the Limitation Act, makes it obligatory upon the Court to dismiss a suit instituted after the time prescribed for the purpose, and as section 50 of the Civil Procedure Code, 1882, casts the duty upon the plaintiffs to specify the point of time when the cause of action arose, the burden of proof is upon the plaintiffs to establish the true character of the tenancy and the applicability of the rule of limitation upon which they place reliance. In answer to this contention, it has been argued by the learned vakil for the plaintiffs respondents, that the onus is upon the defendants to prove the special circumstances which would abridge the ordinary period of limitation applicable to cases of this description. In our opinion, the contention of the respondents is well-founded and must prevail.

Article 142 of the second Schedule of the Limitation Act provides that a suit for possession of immovable property, when the plaintiff while in possession of the property has been dispossessed or has discontinued possession, must be instituted within twelve years from the date of the dispossession or discontinuance. There is no room for controversy that the present suit is one for possession of immovable property within the meaning of the rule thus laid down. *Prima facie*, therefore, this is the rule applicable to the matter now before us. The defendants, however, contend that the period which would otherwise be available to the plaintiffs has been abridged, because the plaintiffs are occupancy raiyats, and that they are bound to sue within two years from their dispossession as laid down in Article 3 of Schedule III of the Bengal Tenancy Act. That Article provides that a suit to recover possession of land claimed by the plaintiff as an occupancy raiyat must be instituted within two years from the date of dispossession. As the defendants rely upon the special rule, the burden is obviously upon them to establish the circumstances requisite to make the rule applicable. The plaintiffs do not claim to recover possession of the land as occupancy raiyats. It may be conceded that if it was established that the plaintiffs were, as a matter of fact, occupancy raiyats, the mere

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circumstances that, in their plaint, they claimed the disputed land, not as occupancy raiyats but as tenure-holders, would not exclude the operation of Article 3 of Schedule III, because, it is a well-settled principle that parties cannot be allowed to evade the just application of statutory provisions by allegations untrue in fact; if the contrary view were taken, an unscrupulous litigant might evade the bar of limitation created by Article 3 of Schedule III, by an unfounded assertion which would not stand scrutiny. We shall, therefore, assume that Article 3 would be applicable if it was proved that the plaintiffs were in reality occupancy raiyats. But they have not been proved to be such; neither the plaintiffs nor the defendants are able to prove the true character of the tenancy. Under such circumstances, as the special rule embodied in Article 3 of Schedule III is not shewn to be applicable, we must fall back upon the general rule embodied in Article 142 of the Limitation Act, which, it cannot be disputed, is, by its very terms, applicable to the case. The position that in circumstances like these the burden of proof is upon the party who asserts that the case has been taken out of the general rule and is governed by the special rule, is supported by the principle which underlies the decisions in *Mohansingh* v. *Conder* [1], *Dammull* v. *B. I. S. N. Co.* [2] and *Maugun Jha* v. *Dolhin* [3]. The burden of proof is rightly thrown on the party who claims the protection of the shorter period, because he would fail in his contention if no evidence at all were given on this question on either side. (Sections 102 and 103 of the Indian Evidence Act, 1872). The wider clause is, by the very generality of its terms, comprehensive enough to govern the matter, and if its operation is sought to be excluded on the ground that the case is covered by a special clause, the party who takes up this position must prove the existence of the special fact which operates as a bar to the suit, except perhaps when the facts are specially within the knowledge of the plaintiffs. (Section 106, Indian Evidence Act, 1872). To put the matter in another way, if there is a conflict between two periods of limitation, one of which, the longer, is applicable to all circumstances, and the other, the shorter, to special circumstances only, the

[1] (1883) I. L. R. 7 Bom 478.
[2] (1886) I. L. R. 12 Calc. 477.
[3] (1822) 3 Br. & Bi. 223.

longer term given by the statute to bring the suit ought to be applied unless there is clear proof of the special circumstance which would make the shorter term applicable. *Crum* v. *Johnson*[1].

The view we take is obviously just and may be defended on first principles, if we remember for a moment the object of statutes of limitation. We are not now concerned with the conflicting opinions as to the policy which underlies statutes of limitation, whether they are to be strictly interpreted because they encourage unconscientious defences [Lord Mansfield, C. J., in *Quantock* v. *England* [2]], or whether they are to be construed liberally because they are statutes of repose [Dallas, C. J., in *Toison* v. *Kaye* [3]], or statutes of peace [Baron Bramwell in *Hunter* v. *Gibbons* [4]]. It is sufficient for our present purpose to hold with Lord St. Leonards, *Trustees of Dundee Harbour* v. *Dougall* [5], that "all statutes of limitation have for their object the prevention of the rearing up of claims at great distances of time when evidences are lost, and in all well-regulated countries the quieting of possession is held an important point of policy." *Luchmee Buxsh* v. *Runjeet Ram* [6] and *White Paruther* [7]. The principle is lucidly explained by Sir Thomas Plumer M. R., in *Cholmondeley* v. *Clinton*[8]. "The public have a great interest in having a known limit fixed by law to litigation for the quiet of the community and that there may be a certain fixed period, after which the possessor may know that his title and right cannot be called in question." In the case before us, the possessor knew that after the expiry of twelve years from his entry, his right could not be called in question. If it was his case that his right ought not to be allowed to be called in question after the expiry of a shorter period, namely after the lapse of two years from the commencement of his possession, it was for him to prove the special circumstances which alone would support a claim for such special protection. The burden, therefore, would be clearly upon him to establish the facts which would justify a reliance on his part upon the special period of

[1] (1856) 26 L. J. Ex. 5.
[2] (1898) I. L. R. 25 Calc. 692.
[3] (1902) 92 N. W. 1054.
[4] (1770) 5 Burr 2628, 2 W. Bl. 702.
[5] (1852) 1 Macqueen H. L. 321.
[6] (1873) 20 W. R. 375 P. C.
[7] (1829) 1 Knapp P. C. 179 (227).
[8] (1820) 2 Jac. & W. 140.

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limitation. This he has failed to do. Consequently, in our opinion, the Subordinate Judge has rightly applied the general rule of limitation.

The result is that the decree made by the Subordinate Judge is affirmed, and this appeal dismissed with costs.

Appeal dismissed.

Note.—Under Act X of 1859 and Bengal Act VIII of 1869, in the provisions corresponding to Art. 3 Sch. III of the Bengal Tenancy Act, the words "illegally ejected by the person entitled to receive rent for the same" occurred, it was held that the special limitations provided for by those Acts did not apply where the suit was one to try a *bonâ fide* question of title; and that where the plaintiff claimed to establish a title which the landlord did not confess and avoid, but denied from the commencement, he could bring his suit within the general period of 12 years from the date of dispossession: *Goorso Doss* v. *Bukhtoo*, 7 W. R., 186 F. B.; B. L. R. Sup. Vol. 628; *Srinath* v. *Ram Ratan*, I. L. R. 12, Calc. 606; *Bosarut* v. *Altaf*, I. L. R., 14 Calc. 624.

SECRETARY OF STATE FOR INDIA
v.
KRISHNAMONI GUPTA.
AND THE CROSS-APPEAL.

[Reported in I. L. R. 29 Calc. 518; L. R. 29 I. A. 104; 6 C. W. N. 617 P. C.]

Present: LORDS MACNAGHTEN, DAVEY, ROBERTSON, and LINDLEY.

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The plaintiffs, called in this litigation the Mozumdars, instituted a suit on 30th March, 1894 to recover possession of 2,245 bighas of alluvial land, on the ground that it was a re-formation on the site of part of their permanently-settled estates of Silimpore in pergunnah Amirabad and Durgapore in pergunnah Berhampore, and that they had been wrongfully ousted from it by the Government.

The plaint alleged that the zemindari pergunnah Amirabad, which was formerly included in Rajshahye district, but now forms part of the district of Faridpore, where it bears the Collectorate number 898, and the zemindari pergunnah Berhampore, which was also in Rajshahye, but now forms part of the district of Pabna, where it bears the Collectorate number 148, belonged to Joy Sunker Mozumdar and his brother Ram Sunker Mozumdar, from whom they descended to the plaintiffs; that previous to 1827 a large portion of the properties Nos. 898 and 148 having been washed away by the force of the current of the river Pudma re-formed again, and was upon such re-formation taken possession of and held by the plaintiffs' predecessors; that while they were in possession of such re-formed land, the Government took resumption proceedings under Regulation II of 1819, and had a survey made of, amongst others, 9,407 bighas of the land which had so re-formed, but on 17th August, 1827 the said land was released by the Government and remained in the possession of the predecessors of the plaintiffs; that various other resumption proceedings took place in 1830, 1845 and 1846, and fresh diluvion and alluvion occurred; and that while the Mozumdar family was represented by youths or *purdanashin* ladies unable to protect their interests (all the elder members of the family having died off), *thak* and revenue survey measurements were made in the years 1857 to 1859, and the

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re-formations in the site of the lands belonging to the Mojumdars were measured as belonging to and were taken possession of by the Government, and a leasehold settlement of such re-formed lands was concluded with the Mozumdars; that there was again further diluvion, and the lands in question began to re-form from the year 1884, when the Mozumdars took possession of them and were dispossessed by the Government in June, 1885; and that being unable to recover possession by other means, this suit was brought, in which the Mozumdars prayed that their title to the said lands might be declared and a decree made in their favour for possession of the lands, for *mesne* profits, and for further and other relief.

The Government filed a written statement on 1st November, 1894, in which, amongst other defences, they (*a*) denied that the Mozumdars were ever in possession of the land sued for under any claim of proprietary right; (*b*) denied that the land sued for was any part of any of the estates alleged to belong to the Mozumdars; (*c*) submitted that the Mozumdars having acknowledged the title of the Government to the said lands by taking farming settlements of it from the Government from 1849 to 1882 were estopped from denying the title of the Government to the said lands; (*d*) denied that the land claimed was any portion of the 9,407 bighas of land alleged to have been released to the Mozumdars in August, 1827, or was a re-formation *in situ* of any of the Mozumdars' estates, (*e*) denied that the Mozumdars' villages lay to the immediate north of the Government estates of Dhunchi, Sonakandar, and Gachiadaha, and alleged that the said villages had the river Pudma laying on their immediate north; (*f*) submitted that it appeared clearly from the *thakbust* and revenue survey measurements made in 1858-59 that the land claimed in the suit was part of the Government estates of Dhunchi, Sonakandar, and Gachiadaha, and that this had been admitted and acknowledged by the Mozumdars, who had for more than thirty years acknowledged the title of the Government by taking leases of the said land from the Government, who had, in April, 1882, resumed khas possession of the lands so leased.

The judgment of their Lordships was delivered by

April, 18.

Lord Davey.—The river Pudma is one of those great rivers in India which frequently change their course. Sometimes it

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has cut from north to south and then again from south to north, and sometimes it has cut in both directions at the same time. As the bed of the river has shifted from time to time, cultivable lands have been submerged and again lands, which had been submerged, have been re-formed and become cultivable. The plaintiffs in the action out of which these appeals arise are the present representatives of a family named Mozumdar, and they and their ancestors are conveniently referred to as the Mozumdars. A permanent settlement was made with this family under Regulation I of 1793 of zemindaris Nos. 898 and 148 at a fixed assessment. These zemindaris were on the north of what was at the time of settlement the river bed. They are said to have comprised a mauz.. called Mowkuri ; but owing to changes in the river-bed the name has disappeared from the maps, and the identification of the site of this mauza was one of the questions of fact in the case. The Government are the proprietors of the khas mehals chur Dhunchi, Sonakandar, and Gachiadaha, situate on what was in earlier times the southern bank of the river.

The Mozumdars commenced this action on the 30th March, 1894, claiming certain lands which had been submerged and were re-formed as appertaining to mauza Mowkuri and part of their zemindaris. The Government by their written statement pleaded (amongst other things) that neither the plaintiffs nor their predecessors ever were in possession of the land claimed in their alleged proprietary right, and that the suit was barred by limitation. The only issues to which their Lordships' attention was directed were the second, whether the suit was barred by limitation, and the fourth, whether the land in dispute formed any portion of estates Nos. 898 and 148 at the time of the permanent settlement.

The land originally in dispute is defined by a yellow line on the amin's map appended to the High Court's decree. It was admitted by Counsel for the Mozumdars that they could not maintain their claim to the pointed triangular piece to the south of what is called the line of 1845, and on the other hand the Government do not now claim a small piece to the north of the line of 1859. The land now in dispute therefore is comprised between the lines of 1845 and 1859, which describe approximately

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the southern bank of the river at those respective dates. Those lands are divided into two nearly equal portions by a blue line describing the river bank of 1869. The Subordinate Judge decided wholly in favour of the Government. The High Court decided in favour of the Mozumdars as to the portion of the land lying between the line of 1859 on the north and the blue line of 1869 on the south, and in favour of the Government as regards the southern portion between the line of 1869 and the line of 1845. Both parties have appealed.

The learned Counsel for the Government for the purposes of the appeal accepted the facts as found by the High Court and relied exclusively on limitation in support of their claim. Their Lordships therefore are not called on to discuss any of the questions of fact, which were in issue in the Court below. The High Court has found that the land now in dispute formed part of a tract of 9407 bighas which had been released to the Mozumdars in 1827 as forming part of their permanently-settled lands. Their Lordships need only state the subsequent events so far as may be necessary to make the argument on behalf of the Government intelligible.

Between 1839 and 1845 the river had moved northwards to the line of 1845, and an island had been formed on the south of the then river-bed. By a proceeding in the Collectorate of the 17th April, 1846 this land was decreed in favour of the Government as Jajira. *Ijara* settlements were made by the Government for this Jajira land for terms of ten years.

By the year 1859 the river had again moved northwards to the line of 1859, and the lands now in dispute, which in 1845 had been submerged, were re-formed. The Government claimed these lands as an accretion to their Jajira land, and by proceedings in the Collectorate of February, 1859 they were adjudged to the Government as being within Dhunchi, Sonakandar, and Gachiadaha. Thereupon *ijara* settlements of these lands also were made with the Mozumdars for terms of ten years from 1st May, 1859 to 30th April, 1869,—and the Mozumdars entered into possession under the *ijaras* and paid the *jummas* thereby reserved.

After 1859 the river moved southwards, and in 1869 when the last-named ijara settlements determined the southern bank

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was the blue line called the line of 1869, the lands in dispute north of that line having become submerged. The Mozumdars appear to have renewed their *ijaras* for the parts of the disputed land from time to time unsubmerged, usually from year to year, until the year 1882. The river has now again moved northwards, and all the lands submerged between 1859 and 1882 have been re-formed.

In 1885 the Mozumdars took possession of the lands in dispute, but were dispossessed by the Government in the following year.

On these facts the Government contend that the possession of the Mozumdars under the *ijaras* granted to them was in fact and in law the possession of the Government claiming proprietary right in the disputed lands, and that such possession was in exclusion of and adverse to the claim of the Mozumdars to be proprietors thereof. As regards the southern portion between the lines of 1845 and 1869, the learned Judges in the High Court have found that the Government were unquestionably in possession from the year 1859 to the year 1874-75, and they hold that, if the Government acquired an adverse title in respect thereof that title could not be lost unless they were out of possession of the same for sixty years.

It may at first sight seem singular that parties should be barred by lapse of time during which they were in physical possession and estopped from disputing the title of the Government. But there is no doubt that the possession of the tenant is in law the possession of the landlord or superior proprietor, and it can make no difference whether the tenant be one who might claim adversely to his landlord or not. Indeed in such a case it may be thought that the adverse character of the possession is placed beyond controversy. On the expiration of first *ijara* settlement for ten years the estoppel came to an end, and the Mozumdars might have asserted their title against the Government. But they preferred to renew their *ijaras* from year to year. This part of the case was not seriously contested by Mr. Mayne on behalf of the Mozumdars, and indeed it was admitted by him that the Government were in possession from the date of the proceedings in the Collectorate of February, 1859.

As regards the northern portion of the disputed lands, other considerations apply. The Government have never had actual

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possession of the land through their *ijaradars* for a continuous period of twelve years, because the lands became submerged prior to the year 1869, and remained so (it is found by the High Court) until within ten years of the commencement of the suit. But it is urged on behalf of the Government that, having been in possession through their tenants when the lands became submerged, their possession must be deemed to have continued in law while the lands were under water and to have revived on their being re-formed, and reliance is placed on a case of *Kally Churn Sahoo* v. *The Secretary of State*,[1] decided by the High Court in 1881. For the purpose of trying the question whether limitation applies, the Government must be regarded as a trespasser and dispossessor of the rightful owners, and in the opinion of their Lordships it would be contrary both to principle and authority to imply such constructive possession in favour of a wrongdoer, so as to enable him to obtain thereby a title by limitation. In order to sustain a claim to land by limitation under the Indian Act, there must in their opinion be actual possession of a person claiming as of right by himself or by persons deriving title from him. The possession of the Government was in fact determined by the submergence of the land which then became derelict, and so long as it remained in that state, no title could be acquired against the true owner. Sir R. Garth, however, seems to have thought that in such a case the possession of the trespasser would continue, until the true owner resumed possession.

Their Lordships cannot agree in this view. On the contrary, they think that on the dispossession of the Government by the *vis major* of the floods, the constructive possession of the land was (if anywhere) in the true owners. In the case of the *Trustees, Executors, and Agency Company* v. *Short* [2], it was laid down by this Board that "if a person enters upon the land of another and holds possession for a time, and then without having acquired a title under the statute abandons possession, the rightful owner on the abandonment is in the same position in all respects as he was before the intrusion took place." And the opinion of Parke B., is there quoted that there must be both

[1] (1881) I.L.R. 6 Calc. 725.

[2] (1888) L. R. 13 A. C. 793.

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absence of possession by the person who has the right and actual possession by another to bring the case within the statute.

Their Lordships think that for this purpose dispossession by *vis major* has the same effect as voluntary abandonment, and they are of opinion that the case of *Kally Churn Sahoo* v. *The Secretary of State* [1] was wrongly decided and ought to be overruled. In the result therefore their Lordships agree with the Court below on this part of the case and the appeal of the Secretary of State fails.

Only one point was raised in the cross-appeal of the Mozumdars, which may be shortly disposed of. They say that the whole of the disputed land has been found to have been at one time part of their zemindaris, of which (as already mentioned) a permanent settlement was made with them, and they point to the third clause of the Regulation of 1793, by which the Government engage not to raise the assessment on permanently-settled lands. They have always paid and continue to pay the full amount of this assessment and it is argued that the exaction by the Government of the *jummas* under the *ijaras* in addition to the assessment under the permanent settlement was a breach of the engagement and the Government (they say) are stopped from asserting khas proprietary rights in the land. It is difficult to see where the estoppel comes in, and what must be meant is that the zemindars should be deemed to have been in possession of the lands as part of their zemindaris and not under the *ijaras* (which should be treated as a mere usurpation or overcharge), and therefore there is no case of limitation. The grievance felt by the Mazumdars is intelligible enough, but their Lordships can only decide the questions between the parties according to law, and it is outside their province to deal with any question of hardship. The question really is, what was the character of the possession of the lands after the grant of the *ijaras*, and whether in the events which have happened they remain or are part of the zemindaris in respect of which the permanent assessment is paid heir? The answer can only be that the Mozumdars elected and agreed to hold the lands not as part of their zemindaris, but as the part of a khas mehal of the Government, and to pay the *jummas* reserved by the *ijaras* on

[1] (1881) I. L. R. 6 Calc. 725.

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that footing. What led to the change of the position of the Mozumdars was the decision of the Collectorate in February, 1859 that these lands belonged to the Government as an accretion to their Jajira land. This decision was acquiesced in by the Mozumdars, and no case has been proved for relieving them from the legal consequence of their acquiescence. But it may be observed that this decision of 1859 was given prior to the case of *Lopez* v. *Muddun Mohun Thakoor* [1], decided by this Board in 1870. It is for the Government, not for their Lordships, to say whether the Government should insist on a title acquired by limitation in consequence of a decision in the Collectorate under an erroneous impression of the law. Their Lordships can only say that they agree on this part of the case also with the learned Judges of the High Court, and the cross-appeal fails.

Their Lordships will therefore humbly advise His Majesty that both appeals should be dismissed and the appellants in each case will pay the costs of their appeal.

Appeals dismissed.

NOTE.

If a man buy a piece of open ground, he is not bound to enclose it or build upon it or formally to take possession of it; nor, if he does formally take possession of it, is he bound to proclaim by subsequent acts the continuance of possession: so long as the land remains unoccupied his rights are not interfered with, and he is not called upon to assert them. He has no cause of action, and there is no person whom he can sue. His cause of action accrues when another person takes possession of the land, and not before.

The term 'possession' is one which is used in widely different senses in dealing with different subjects and refers sometimes to tangible or physical possession and sometimes to constructive or legal possession: *Chidambara* v. *Rosasami*, 13 M. L. J. 467; I. L. R. 27 Mad. 67.

Possession is *prima facie* proof of ownership; it is so because it is the sum of the acts of ownership. This applies both to prior and to present possession. Possession has a two-fold value: it is evidence of ownership, and is itself the foundation of a right to possession: *Hari* v. *Dhondi*, 8 Bom. L. R. 96; see also *Bhagwansing* v. *The Secretary of State*, 10 Bom. L. R. 571. A person who has taken possession of land without title has, while he continues in such possession and even before the statutory period has elapsed, a transmissible, devisable and heritable interest in the property though one which is liable at any moment to be defeated by the entry of the original owner, and if such person be succeeded in the possession by one claiming through

[1] (1870) 13 Moore's I. A. 467.

him who holds till the expiration of that period, such successor has then as good a right to the possession, as he had himself occupied for the whole period: *Administrator General of Bengal* v. *Abinas*, 3 C. L. J. 53n; *Gobind* v. *Mohan*, I. L. R. 24 All. 157; *Pahlwan*, v. *Ram Bharose*, I. L. R. 27 All. 169; *Shi Gopal* v. *Nisha*, 3 A. L. J. 775; I. L. R. 29 All. 52; *Babu Ram* v. *Banka Bihari*, 3 A. L. J. 424, and *Subbaraya* v. *Aiyasseami*, I. L. R. 32 Mad. 86.

Possession in law continues until another person interferes with it: *M'Donnell* v. *M'Kinty*, 10 Ir. L. R. 514; *Smith* v. *Lloyd*, 9 Exch. 562; *Agency Company* v. *Short*, 13 App. Cas. 793. In order to bring a case within the statute of limitation, there must be both absence of possession by the person who has the right and actual possession by another, whether adverse or not, to be protected. E. G. Immediately after an execution sale in 1893, the defendants took proceedings to set it aside but were unsuccessful. They then instituted a suit in 1895 to set aside the decree on the ground of fraud and to have the sale cancelled as held pursuant to a fraudulent decree. The proceedings in that suit terminated on the 27th June, 1905, when it was dismissed. *Held*, that in the eye of the law, the possession vested in the plaintiffs, the rightful owners, as soon as the occupation of the defendants terminated in fact: consequently, the plaintiffs' cause of action arose in 1905, when the defendants took possession. *Pramotha* v. *Kishore*, 25 C. L. J. 133; 21 C. W. N. 304.

Adverse possession means possession by a person holding the land on his own behalf of some person other than the true owner having a right to immediate possession; *Bejay* v. *Kally Prosonno*, I. L. R. 4 Calc. 329; *Balkrishna* v. *Govind*, 4 Bom. L. R. 312; I. L. R. 26 Bom. 617. Possession cannot be adverse unless the claims of the parties are hostile and adverse to each other: *Chaitan* v. *Sadhari*, 5 C. L. J. 62. The acts required by law to constitute a title by adverse possession must be of an unequivocal character, and they must be such that no legal origin can be ascribed to them: *Lallubhai* v. *Mankuverbai*, I. L. R. 2 Bom. 413; *Vasu* v. *Fulchand*, 4 Bom. L. R. 964. Adverse possession to be effective, must be possession adequate in continuity, in publicity and in extent of area. The possession to be adverse, must be actual, visible, exclusive and hostile. The acts of user, in order that they may take the soil out of the true owner and vest in the wrong-doer, must be of a character such as is inconsistent with the enjoyment of the soil for the purposes for which he intended to use it. *Nawab Bahadur* v. *Gopi Nath*, 13 C. L. J. 625. Sole occupation of a part of the joint estate by one co-owner does not necessarily imply an ouster of the other co-owner. *Dwijendra* v. *Purnendu*, 11 C. L. J. 189. But where one co-owner dealt with joint property as if it belonged exclusively to himself and alienated the whole of it to a stranger, there was an assertion of hostile title on his part and the transferee is entitled to possession of his share of the property: *Nagendra* v. *Hara Chandra*, 14 C. L. J. 646. A co-sharer though with the tacit or express consent of his co-sharer in sole occupation of a portion of joint property, is not entitled to change the nature of that possession or to use the property in a mode different from that in which it had previously been used: *Israil* v. *Samser*, 19 C. L. J. 47; 18

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C. W. N. 176; I. L. R. 41 Calc. 436. The leading case shows that a true owner by holding as a tenant under the trespasser is dispossessed.

There may be adverse possession by natural guardian against his infant ward: *Basanta Kumari* v. *Kamikshya*, 2 C. L. J. 238 P. C.; 10 C. W. N. 1; I. L. R. 33 Calc. 23; by Government against Court of Wards representing a private person: *Guru Dass* v. *Basanta Kumari*, 14 C. W. N. 317; 11 C. L. J. 373.

The tenant's possession may be adverse to that of his landlord when he asserts an independent title to the knowledge of the person against whom he claimed his title; *Srinath* v. *Sattya*, 13 C. L. J. 660. Before a party can be said to have acquired a title by adverse possession against another whom he had dispossessed, it is necessary to find not only that the other has been dispossessed, but that the party claiming title has been in possession and has exercised rights of possession over the disputed tract: *Durga* v. *Konchai*, 5 C. L. J. 71; *Maharaja Birendra* v. *Bharat*, 22 C. L. J. 117; *Kadir Bux* v. *Maharaja Birendra* 22 C. L. J. 119.

The possession of a person claiming to hold property adversely to the mortgagor does not become adverse to the mortgagee, who has purchased the property at a sale in execution of a decree obtained on his mortgage until after the sale when the ownership in, and the beneficial title to, the land for the first time vests in him. *Aimadar* v. *Makhan*, 10 C. W. N. 904; I. L. R. 33 Calc. 1015; *Ismdar* v. *Ahmad*, 5 A. L. J. R. 85; I. L. R. 30 All. 119. *Vyapuri* v. *Sonamma*, '29 M. L. J. 645 F. B. *Tarubai* v. *Venkatrao*, 4 Bom. L. R. 721; I. L. R. 27 Bom. 721. The mortgagor and the mortgagee may agree at any time that the mortgagee shall be in possession of the mortgaged property as owner thereof; and possession so held by the mortgagee for over 12 years will extinguish the mortgagor's title to redeem; *Unman* v. *Nagalla*, 23 M. L. J. 360; I. L. R. 37 Mad. 545.

Where the tenant encroaches *prima facie* in his character as tenant, the landlord is entitled to treat him as such till he has notice of a repudiation of such character and an assertion of a hostile title: *Ishan* v. *Raja Ramranjan*, 2 C. L. J. 125; *Wali Ahmed* v. *Tata*, I. L. R. 31 Calc. 397; *Maharaja Birendra* v. *Laksmi*, 22 C. L. J. 129; *Maharaja Birendra* v. *Gopan*, 22 C. L. J. 132.

Possession of a limited interest in immovable property may be just as much adverse for the purpose of barring a suit for the determination of that limited interest, as adverse possession of a complete interest in the property operates to bar a suit for the whole property; but such adverse possession of limited interest is good only to the extent of that interest. The nature and effect of possession depend upon the nature and extent of the rights asserted by the overt conduct or express declaration of the person relying on it; *Ishan* v. *Raja Ramranjan*, 2 C. L. J. 125; *Icharan* v. *Nimoney*, I. L. R. 35 Calc. 470; 7 C. L. J. 499; 12 C. W. N. 636; *Gopal* v. *Lakhiram*, 16 C. W. N. 634; *Kali* v. *Dabiruddin*, 18 C. W. N. 654; *Fatasinji* v. *Ramanji*, 5 Bom. L. R. 274; L. L. R. 27 Bom. 515; *Trimbak* v. *Shekh Gulam*, 12 Bom. L. R. 208; I. L. R. 34 Bom. 329. A rent free grant may be inferred from long possession without payment of rent. *Nawab Ali* v. *Maharaja Birendra*,

22 C. L. J. 124; *Jafer* v. *Maharaja Birendra*, 22 C. L. J. 126; *Maharaja Birendra* v. *Chandi*, 22 C. L. J. 134.

The doctrine of constructive possession cannot be applied in favour of a wrong-doer, whose possession is to be confined to actual possession. *Nawab Bahadur* v. *Gopi Nath*, 13 C. L. J. 625. It is applied only in favour of a rightful owner: *Jogendra*, v. *Baladeo*, I. L. R. 35 Calc. 961; 6 C. L. J. 735; 12 C. W. N. 127; *Ananda Hari* v. *Secretary of State*, 3 C. L. J. 317; *Mirza Shamsher* v. *Munshi Kunj Behari*, 12 C. W. N. 273; 7 C. L. J. 414; *Amrita Sundari* v. *Serajuddin*, 19 C. W. N. 565 (577). If the land be in possession of a trespasser during the part of the year when it is not submerged, the constructive possession is in the rightful owner and a title by adverse possession cannot be acquired by a trespasser. *Leknath* v. *Manorath*, 11 A. L. J. R. 68.

There is no difference in principle as regards the application of the statute of limitation between the case of mines and the case of other land where the fact of possession is more open and notorious.

Incorporeal rights such as easements are not capable in an exact sense of being possessed; and unless an easement had ripened into a prescriptive one, mere enjoyment of the easement for any length of time short of the full period of prescription gives no right for the enjoyer to maintain an action against any person infringing such a user: *Narasappaya* v. *Ganapathi*, I. L. R. 38 Mad. 280.

THE TRUSTEES, EXECUTORS, AND AGENCY COMPANY LIMITED, AND TEMPLETON.

v.

SHORT.

[Reported in 13 App. Cas. 793.]

J. C. 1888 June 22, 26; Aug. 1.

The Judgment of their Lordships was delivered by

Lord Macnaghten—On the 23rd of December, 1885, the appellants, as plaintiffs, brought an action against the respondent, as defendant, to recover fifty acres of land situated in the district of Botany Bay, in the County of Cumberland, in the Colony of New South Wales.

The defence was the Statute of Limitations (3 and 4 Will. 4, C. 27), which was adopted in the Colony by the Act No. 3 of 1837.

The action come on for trial in September, 1886, before the late Chief Justice Martin and a jury.

For the present purpose the facts of the case may be stated very shortly. The land in dispute was, until recently, waste open bush. The plaintiffs at the trial proved a complete documentary title deduced from a Crown grant in 1810. But they failed to prove to the satisfaction of the learned judge at the trial that they or any person through whom they claimed had been in actual occupation of the land at any time during the period of twenty years immediately preceding the commencement of the action. On the other hand the defendant, who claimed to have purchased the land within the last few years, did not prove to the satisfaction of the learned judge that he and the person or persons through whom he claimed had been in continuous possession during the statutory period.

The Chief Justice told the jury that when any person went into possession of another's land, and exercised dominion over it, with the intention of claiming it, and the Statute of Limitations thereupon began to run as against the owner of the land, such running was never stopped, notwithstanding that the intruder abandoned the land long before the expiration of twenty years from his first entry, and no other person took possession of such land, and the right of the true owner to

the land would not again arise without an entry by such true owner with the intention of repossessing himself of such land. The Chief Justice also told the jury that at the expiration of the twenty years after such taking possession of the land, as against the true owner, his right of action was defeated, notwithstanding there may not have been twenty years possession as against him.

A verdict was found for the defendant.

On the 27th of October, 1886, the plaintiffs applied for a rule nisi for a new trial on the ground of misdirection. The application was heard before the late Chief Justice, Faucett, J., and Windeyer, J., who refused the rule. The Chief Justice is reported to have said. "There is no doubt that there was evidence sufficient to justify the verdict of the jury as to the occupation of the land more than forty years ago, which caused the statute to run against the legal owner. That being so, there was no evidence whatever that the legal owner during that time ever retook possession, or even walked over the land. The statute having been set running there was nothing to stop it."

To this report Faucett, J., has been good enough to append the following memorandum for the information of their Lordships:—

"This is substantially a correct note of the reasons given by the late Chief Justice for refusing the rule in this case His judgment was given in very few words.

"I may add that it has been before held by this Court that when the rightful owner of land has been dispossessed, and the statute has once begun to run against him, the statute does not cease to run; in other words, the operation of the statute is not suspended until the rightful owner has exercised some act of ownership on the land; and that if the rightful owner allows twenty years to elapse, from the time when the statute so first began to run, without exercising any such act of ownership, he cannot recover in ejectment against any person who may happen to be in possession at the end of the twenty years, although there may have been an interval in the twenty years during which no one was in possession.

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"To stop or suspend the operation of the statute there must be some new act of ownership on the part of the rightful owner. There must be, as it were, a new departure."

The doctrine appears to have had its origin in the case of *Laing* v. *Bain*, which was before the Supreme Court on a motion for a new trial in March, 1876. Their Lordships were referred to a note of the case in Oliver's Real Property Statutes, p. 79. Martin, C. J., is there reported to have said that "it was clear law that if the statute once commenced to run it would not stop except by the owner going into possession and so getting, as it were, a new departure."

Their Lordships are unable to concur in this view. They are of opinion that if a person enters upon the land of another and holds possession for a time, and then, without having acquired title under the statute, abandons possession, the rightful owner, on the abandonment, is in the same position in all respects as he was before the intrusion took place. There is no one against whom he can bring an action. He cannot make an entry upon himself. There is no positive enactment, nor is there any principle of law, which requires him to do any act, to issue any notice, or to perform any ceremony in order to rehabilitate himself. No new departure is necessary. The possession of the intruder, ineffectual for the purpose of transferring title, ceases upon its abandonment to be effectual for any purpose. It does not leave behind it any cloud on the title of the rightful owner or any secret process at work for the possible benefit in time to come of some casual interloper or lucky vagrant.

There is not, in their Lordships' opinion, any analogy between the case supposed and the case of successive disabilities mentioned in the statute. There the statute "continues to run" because there is a person in possession in whose favour it is running.

There is no direct authority on the point in this country. But such authority as there is seems to be opposed to the doctrine laid down by the Supreme Court. It is sufficient to refer to *McDonnell* v. *McKinty*[1], Lord St. Leonard's Real Property Statutes, p. 31, and *Smith* v. *Lloyd*[2]. In the

[1] 10 Ir. L. R. 514. [2] 9 Exch. (Welsby, H. & Gor.) 562.

latter case, which was decided in 1854. Parke, B., giving the judgment of the court, says:—"We are clearly of opinion that the statute applies, not to want of actual possession by the plaintiff, but to cases where he has been out of, and another in, possession for the prescribed time. There must be both absence of possession by the person who has the right, and actual possession by another, whether adverse or not to be protected, to bring the case within the statute. We entirely concur in the judgment of Blackburne, C. J., in *McDonnell* v. *McKinty*[1], and the principle on which it is founded."

Their Lordships have only to add that, in their opinion, there is no difference in principle as regards the application of the statute between the case of mines and the case of other land where the fact of possession is more open and notorious. It is obvious that in the case of mines, the doctrine contended for might lead to startling results and produce great injustice.

In the result, therefore, their Lordships have come to the conclusion that the direction given to the jury by the learned Chief Justice was not law, and they think that there was substantial miscarriage in the trial.

They will, therefore, humbly advise Her Majesty that the judgment of the Supreme Court refusing the rule nisi ought to be reversed, that a new trial ought to be directed, and that the costs in the former trial and of the application for the rule ought to be costs in the action.

The respondent will pay the costs of the appeal.

NOTE.

Possession in law continues until another person interferes with it: *M'Donnell* v. *M'Kinty*, 10 Ir. L. R. 514; *Smith* v. *Lloyd*, 9 Exch. 562

Where a person in wrongful possession goes out, but is not followed into possession by others, the true owner's possession is revived, and the limitation which commenced to run against him ceases to do so. For the continuance of the running of time, there must always be some one against whom the plaintiff can bring an action of ejectment. This other's possession must be possession on his own behalf, and not with the permission of the owner. See *Durga* v. *Konchai*, 5 C.L.J. 71 (79).

To constitute dispossession there must, in every case, be positive acts which can be referred only to the intention of acquiring exclusive control (*Sundarasastrial* v. *Govinda*, I. L. R. 31 Mad. 528; 19 M. L. J. 309), and which

[1] 10 Ir. L. R. 514.

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are inconsistent with the purpose to which the owner intends to devote the land. *Wali Ahmed* v. *Tata*, I.L.R. 31 Calc. 397.

The nature of *chur* and *jungle* lands is peculiar and mere cessation of possession cannot amount to discontinuance of possession, unless it is followed by the possession of another person in whose favour time would run: *Madhabi* v. *Gogusendra*, 9 C.W.N. 111.

See in this connection Note to *Secretary of State* v. *Kristamoni*, I.L.R. 29 Calc. 518.

Before JENKINS C.J., STEPHEN, WOODROFFE, HOLMWOOD AND D. CHATTERJEE, JJ.

GOPESHWAR PAL

v.

JIBAN CHANDRA CHANDRA.

[*Reported in I.L.R. 41 Calc. 1125; 19 C.L.J. 549; 18 C.W.N. 804*].

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April, 24.

The facts of the case are as follows:—

The suit was brought for declaration of title to and possession of a certain piece of land of an area about 10 bighas. The land in dispute was originally *ghatwali* land, held by one Kali Lohar, the *ghatwal*. In the year 1866, the *ghatwal* granted to the plaintiff's great grand-father a temporary lease of the land in dispute for cultivating purposes.

In the year 1874 a renewed lease was granted to the plaintiff's grand-father by a registered document. On the 1st of April, 1879, documents were executed purporting to convert the holding into a *Mokarrari*.

In the year 1902, the *ghatwali* land was resumed by the Maharajah of Burdwan and the Maharajah settled the land with the former *ghatwal* Kali Lohar in May, 1902.

On the 28th June, 1903, Kali Lohar sold the lands to the contesting defendants, who almost immediately dispossessed the plaintiff of the same. The present suit was instituted in the month of July, 1909.

The judgment of the Court was as follows:—

Owing to a difference of opinion, a point of law has been stated by Mr. Justice Fletcher and Mr. Justice N. R. Chatterjea under section 98 of the Civil Procedure Code, and the appeal has accordingly been heard upon that point only by five of the other Judges of the Court. The point of law stated is whether the decision of the majority in the case of *Manjhoori Bibi* v. *Akel Mahumed*[1] has been affected by the judgment of the Privy Council in the case of *Soni Ram* v. *Kanhaiya Lal*.[2] The actual decision of the majority in *Manjhoori Bibi's Case*,[1] was that the special rule of limitation extended to under-raiyats by the amendment in 1908 of the 3rd Article in the 3rd Schedule of the Bengal Tenancy Act did not apply, where the dispossession was in 1898 and the suit for recovery of possession was instituted on the 25th of August, 1908.

The judgment of the Privy Council in *Soni Ram* v. *Kanhaiya Lal*[2] was concerned not with the special law of

[1] (1913) 17 C. W. N. 889. [2] (1913) I. L. R. 35 All. 227; L. R. 40 I. A. 74.

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limitation, but with the general law as enacted in Act XIV of 1859 and Act XV of 1877. The suit in that case was instituted on the 4th March, 1907, and was brought for the redemption of a mortgage. One defence was the bar of limitation. The plaintiff sought to meet this plea by setting up certain acknowledgments, and relied on the fact that they had been given, when Act XIV of 1859 was in force. On the other side, it was argued that the case was governed by Act XV of 1877, and so the plaintiff could not claim the benefit of the law as to acknowledgment contained in the earlier Act. As to this it was said by the High Court: "the law of limitation applicable to a suit or proceeding is the law in force at the date of the institution of the suit or proceeding, unless there is a distinct provision to the contrary: see *Gurupadapa Basapa* v. *Virbhadrapa Irsangapa*.[1] As Act No. XV of 1877 was in force when the suit was brought and there is no provision in it limiting or postponing its application, section 19 of that Act applied to the case": *Shib Shankar Lal* v. *Soni Ram*.[2] This statement of the law was approved by the Privy Council on appeal and it is this approval that is supposed to have affected the decision of the majority in *Manjhoori Bibi* v. *Akel Mahumed*.[3] It certainly is not a decision on the same Act as that under consideration in *Manjhoori Bibi's Case*,[3] and as it is the construction and effect of a different Act that was under consideration, the Privy Council judgment cannot be regarded as a direct authority on the Act not before it.

On the contrary the essential conditions of the two cases are so distinct that in our opinion it cannot be said that the earlier decision is, in relation to the circumstances of this case, affected by the judgment of the Privy Council. It is an established axiom of construction that though procedure may be regulated by the Act for the time being in force, still the intention to take away a vested right without compensation or any saving, is not to be imputed to the Legislature unless it be expressed in unequivocal terms [Cf. *The Commissioner of Public Works (Cape Colony)* v. *Logan*.[4]] That this view is not limited to those cases where rights of property in the limited

[1] (1883) I. L. R. 7 Bom. 459.
[2] (1909) I. L. R. 32 All. 33, 43.
[3] (1913) 17 C. W. N. 889.
[4] [1903] A. C. 355

sense are involved, is shown by *The Colonial Sugar Refining Co.* v. *Irving*,[1] where it was held that an Act ought not to be so construed as to deprive a suitor of an appeal in a pending action, which belonged to him as of right at the date of the passing of the Act. Equally is a right of suit a vested right, and in *Jackson* v. *Woolley*,[2] the Court of Exchequer Chamber declined, in the absence of something putting the matter beyond doubt, to put on an Act a construction that would deprive any person of a right of action vested in him at the time of the passing of the Act.

Williams J. said: "It would require words of no ordinary strength in the statute to induce us to say that it takes away such a vested right."

Here the plaintiff at the time when the amending Act was passed had a vested right of suit, and we see nothing in the Act as amended that demands the construction that the plaintiff was thereby deprived of a right of suit vested in him at the date of the passing of the Amending Act. It is not (in our opinion) even a fair reading of section 184 and the third Schedule of the Bengal Tenancy Act, as amended, to hold that it was intended to impose an impossible condition under pain of the forfeiture of a vested right, and we can only construe the amendment as not applying to cases where its provisions cannot be obeyed. The law as amended may regulate the procedure in suits in which the plaintiff could comply with its provisions, but cannot (in our opinion) govern suits where such compliance was from the first impossible. The effect is to regulate not to confiscate. There are thus two positions; where in accordance with its provisions a suit could be brought after the passing of the amendment, it may be that the amendment would apply, but where it could not, then the amendment would have no application. The facts in *Soni Ram* v. *Kanhaiya Lal*[3] did not involve the second of these positions, and we therefore hold that the decision of the majority in *Manjhoori Bibi* v. *Akel Mahumed*,[4] so far as it relates to that position, has not been affected by the

[1] [1905] A. C. 369.
[2] (1858) 8 El. & Bl. 784; 120 E. R. 292.
[3] (1913) I. L. R. 35 All. 227; L. R. 40 I. A. 74
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judgment of the Privy Council in *Soni Ram* v. *Kanhaiya Lal*;[1] though it may perhaps be affected if and so far as it lays down a similar rule for suits within the first of the two positions. This however, is a point not before us, and on it therefore we do not express any definite opinion. Our judgment is on the question of limitation only, and the result is that we restore the decree of the Munsif with costs throughout.

NOTE.

If when the new Act comes into force the right to sue is not subsisting, the parties cannot avail themselves of the remedy given by the new Act. *Srinath* v. *Khetter*, L. R. 16 I. A. 85; I. L. R. 16 Calc. 693. Their Lordships of the Judicial Committee pointed out that the cause of action under the old law arose in February, 1866, when the mortgagor's right to possession was determined, and that when the Transfer of Property Act came into force that right had become extinguished; and they consequently held that there was nothing in the Transfer of Property Act, Sec. 2, to revive a right which had become extinct. See also *Khunni Lal* v. *Gobind Krishna*, L. R. 38 I. A. 87; I. L. R. 33 All. 356 and *Mahomed Mehdi* v. *Sakinabai*, I. L. R. 37 Bom. 393. But, if the right to sue is subsisting on the date of the new or amending Act, the remedy provided by it is available to the parties: *Pergash Koer* v. *Mahabir*, I. L. R. 11 Calc. 582; *Bhobo Sundari* v. *Rakhal Chunder*, I. L. R. 12 Calc. 583 F. B.; *Chidambaram Chetti* v. *Karuppan Chetty*, I. L. R. 35 Mad. 675; and *Lala Soni Ram* v. *Kanhaiya Lal*, L. R. 40 I. A. 74; I. L. R. 35 All. 227. The leading case shows that the new Act cannot be applied to take away any vested rights to relief existing under the repealed Act.

[1] (1919) I. L. R. 35 All. 227; L. R. 40 I. A. 74.